

1 what, Number 56? So it is reserved subject
2 to Mr. Herring.

3 (Whereupon, the document referred
4 to was marked as Wealth TV Exhibit
5 No. 56 for identification.)

6 MR. ROSE: Fifty-seven is one of
7 the fairly large number of press articles that
8 were offered largely for quotes at the
9 meeting, statements that Mojo and INHD and In
10 Demand, Mr. Jacobson, the CEO of In Demand,
11 were making to the press, and they are, in
12 fact, reports of what the statements he made,
13 57, and there are a fair number of other
14 articles of this nature.

15 MR. COHEN: Your Honor, the
16 articles deal with a whole variety of
17 subjects. So this is 57 through 80, only one
18 of which that I see is a press release which
19 Your Honor thought had the indicia of
20 reliability. That would be 58.

21 But all of the others range from
22 newspaper articles to a book, Multi-Channel

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1 News, Reuters, it deals with all -- Dreams of
2 a High Def Christmas. I think there's a
3 position paper in there that attacks the
4 Center for Creative Voices in Media, that
5 attacks the cable company.

6 This is just a collection -- yeah,
7 73 is "Cable's Level Playing Field not Level."
8 It's a paper by somebody at the Center of
9 Creative Media. So this is a collection of
10 hearsay that doesn't have the indicia of
11 reliability. It goes to the discussion that
12 we had in the morning that Mr. Herring has
13 studied for his testimony and now is going to,
14 has read these articles, and now wants to
15 report on them.

16 We'll deal with whether he's going
17 to report on them, but the articles don't
18 belong in. They have no purpose whatsoever.

19 MR. ROSE: I would quibble with
20 Mr. Cohen's characterization of a couple of
21 these, but quite a number of them are just
22 press articles. Just to get the numbers right

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1 that we concede are press articles with no
2 other indicia of reliability, these would
3 include 57, 59 through 65, 67, 68. Sixty-nine
4 is a learned treatise. It's a textbook of
5 sorts. It's also where we had a third party
6 statement. Seventy, 71, 72 and 73 is the
7 study that Mr. Cohen was just talking about.
8 Seventy-five through 80 are also articles that
9 are just articles.

10 MR. COHEN: Sixty-nine, to be
11 clear, Your Honor, is not a learned treatise.
12 I mean, Mr. Steward is a writer for New Yorker
13 magazine who wrote an article about the -- a
14 book about Disney.

15 MR. ROSE: We're not offering Mr.
16 Herring as an expert in any event. So whether
17 it's a learned treatise or not is probably a
18 moot point.

19 MR. COHEN: And plus they're not
20 giving us the book for copyright reasons. So
21 I don't know what 69 --

22 JUDGE SIPPEL: Copyright reasons?

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1 MR. COHEN: That's what --

2 MR. FELD: Well, we couldn't
3 reproduce the entire book. Again, Your
4 Honor --

5 JUDGE SIPPEL: Oh, oh, oh. Can't
6 you buy a single copy?

7 MR. FELD: Well, you could, but if
8 it's admitted, we would be very pleased, but
9 again, if I may, Your Honor --

10 JUDGE SIPPEL: Go ahead, please.

11 MR. FELD: -- again, these are the
12 documents that are foundational of Mr.
13 Herring's testimony. These are, we would
14 argue, not having studied for to appear as an
15 expert, but certainly trade magazines and
16 newspapers are things that are read by the
17 president of a company in this field to keep
18 up with what is going on and form the basis of
19 his opinions about these things. Reading a
20 book about the field, and he is the president
21 of the company, to keep abreast of these
22 things is hardly the act of an expert or an

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1 unusual thing to be doing. It is entirely
2 appropriate for him as the president of the
3 company to stay informed, and that all of
4 these things form the basis of his testimony.

5 If it is not necessary for us
6 during the course of the testimony to say,
7 "Well, how did you know this?" "Well, I read
8 it in an article in a trade magazine," and
9 have us produce the trade magazine, then we
10 don't need to have these admitted as anything
11 other than a foundation for Mr. Herring's
12 testimony as with the other exhibits.

13 MR. COHEN: Your Honor, my problem
14 with Mr. Feld's position is whatever may be
15 appropriate or not appropriate for Mr. Herring
16 and his business capacity, this is a rule.
17 These are the fundamental rules of evidence.
18 It's not just the expert issue. It's the
19 personal knowledge issue, Rule 602.

20 Mr. herring is supposed to
21 testify, fact or expert, about things about
22 which he has personal knowledge. When you

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1 read an article and read a book, it is not
2 converted into personal knowledge under the
3 rules of evidence or else we'd have one
4 witness. We'd have one witness in each case.
5 They would read everything that was relevant.
6 They would say, "Look. I read this and I read
7 that, and you don't have to worry about the
8 first-hand information," and whatever Mr.
9 Steward says must be true in his book because
10 it was published and we don't have to cross-
11 examine him, and whatever, you know, Multi-
12 Channel News publishes must be true, and we
13 won't get a chance to examine any of those
14 witnesses. It's just hearsay.

15 And the fact -- even if he reads
16 it in the ordinary course, it doesn't convert
17 the hearsay into information about which he
18 has first-hand personal knowledge, which is
19 what a witness is supposed to testify about.

20 JUDGE SIPPEL: I don't think
21 there's any argument about that. I mean, they
22 said -- the last thing I heard Mr. Rose say

1 was that they're not going to offer him as an
2 expert. I'm talking about Mr. Herring. He's
3 not going to be an expert. He's going to
4 testify what he makes business decisions on,
5 that he reads trade literature and making
6 business decisions.

7 You know, so what? You know,
8 unless you -- and if he talks, he says that
9 particular document, that particular issue of
10 trade, whatever it was, said that the
11 demographics were such, such and such, or
12 that, you know, whatever a cable company was
13 targeting, this, this or this, then, no, then
14 you've got a question.

15 MR. COHEN: But that's not what
16 the 100 pages were filled with.

17 JUDGE SIPPEL: A hundred pages of
18 what?

19 MR. COHEN: Of his direct
20 testimony. So when he talks about NHD and
21 what their business strategy is and when he
22 talks about Mojo and what their business

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1 strategy is, he pieces together a story on the
2 basis of these hearsay articles.

3 So we have a problem with respect
4 to his testimony, which we've raised in the
5 motion.

6 JUDGE SIPPEL: Well, that's being
7 worked on.

8 MR. COHEN: Yes, and we've had a
9 discussion, and we'll try to figure out what
10 we have. So I would say other than the -- you
11 know, other than the 658, which is a press
12 release, and Your Honor has said earlier today
13 that that has sufficient reliability, we would
14 ask that you exclude all of these exhibits.

15 Exhibit 74 is an agreement of
16 Herring Broadcasting, and we have to listen to
17 what the relevance of that is, but 57, 59
18 through 73, and 75 through 80 are all
19 impermissible hearsay

20 MR. ROSE: I take exception with
21 Number 66, which is actually an ad that Mojo
22 put out.

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1 MR. COHEN: Let me say the same
2 thing about 67. I agree with you. Sixty-six
3 I would put with 58 based on the rulings of
4 this morning.

5 Thank you.

6 JUDGE SIPPEL: Exhibit 66 and what
7 was the other? And 58.

8 MR. COHEN: Fifty-eight we don't
9 object to. We would object to all of the
10 others in the series. Fifty-seven to 80,
11 putting to one side Exhibit 74, which is an
12 agreement which we have to hear what the
13 relevance of that is.

14 JUDGE SIPPEL: All right.

15 MR. FELD: Again, we've discussed
16 this as we did this morning, and this morning,
17 you know, I would note that with a number of
18 these they were received in reserve for
19 precisely this reason, is that Mr. Herring in
20 telling his story is going to be required to
21 answer certain questions. He's going to have
22 to explain why he thinks that he was denied

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1 carriage. He's going to have to explain that
2 he believes he was denied carriage because
3 they had affiliated programming that they
4 preferred to his. He's going to have to
5 explain what is the basis of that knowledge.

6 The basis of that knowledge is the
7 knowledge that he acquires in the course of
8 his everyday business of running the company,
9 which is from looking at these articles in the
10 trade journals, from reading about the
11 industry in popular books, from encountering
12 these, and again, it's not presented as an
13 expert testimony. It's presented as the basis
14 of why did I do these things, you know, why
15 did I bring this complaint, why do I believe
16 that this was the right thing to do.

17 And unless there is a willingness
18 to stipulate that Mr. Herring is current with
19 what is going on in the industry and his
20 opinions about, you know, his marketing and
21 why there is similarity between the two
22 channels are accepted, it's very difficult to

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1 say how we're going to get here without some
2 ability, you know, to substantiate Mr.
3 Herring's personal source of Mr. Herring's
4 knowledge.

5 JUDGE SIPPEL: I'm not arguing
6 with you on that. What I'm simply saying is
7 you know how the experts do it. . They come in
8 and they make a point, a broad point about an
9 industry, a broad point and say, "Well, that's
10 what the literature supports," and that's an
11 adequate answer as far as it goes. I mean,
12 that's an acceptable.

13 So if he's going to come in and
14 say that that's a business executive, he can't
15 get away with that. He can't just say that's
16 what the literature shows.

17 Now, if he says that, of course,
18 in the course of his day here's what he does,
19 he does this, this, this, and this, and it
20 includes reading a trade journal or two, you
21 know, you look at the subsections of the Wall
22 Street Journal, whatever he does, that's fine.

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1 That's good. That's relevant, and if that's
2 the question, but specifics --

3 MR. COHEN: Your Honor, there's
4 also another problem. If you look at these
5 exhibits, take Number 58. They are printed
6 and produced on February 10th, 2009. Look at
7 Exhibit 58. They're almost all the same.
8 That was the date of production.

9 So there's nothing on the face of
10 those documents. Somebody went to the Web on
11 that date and printed this article on that
12 date. There's nothing on the face of these
13 documents that indicates that on June 14th,
14 2006, in the ordinary course Mr. Herring read
15 it, put it in a file.

16 I mean, that's part of my problem.
17 This is a research base.

18 MS. WALLMAN: Your Honor, with
19 respect to Exhibit No. 58, I thought we were
20 agreed that that was different because it's a
21 press release, but --

22 MR. COHEN: Well, it would be

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1 true, Ms. Wallman, almost anything that comes
2 from the Web.

3 JUDGE SIPPEL: Sixty-six and 58
4 are different. That's what my notes say.

5 MS. WALLMAN: But it just seems
6 exceptionally formalistic to hold it against
7 us because we printed out fresh copies of
8 things so that they could be produced in good
9 order.

10 MR. MILLS: Your Honor, there's
11 another way to look at this thing. This is
12 not a libel case where the impact of the
13 article is what's at issue here. The reason
14 these are in here is because they dovetail
15 with Mr. Herring's direct testimony where he's
16 basically telling the story. He's making
17 argument. He's arguing his case.

18 It's not from personal knowledge,
19 and he's using these articles as though
20 they're true. It's not the impact of the
21 article on Mr. Herring. It's the truth of the
22 matter asserted that he's using them to weave

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1 a story of fact. That's what's improper about
2 this.

3 That's precisely the reason why
4 otherwise in trials all across the country we
5 would have witnesses come in and say, "Well,
6 I read the paper. So why not rely on that?
7 I rely on information I get, and therefore all
8 newspaper articles are admissible in
9 evidence."

10 That's just not the way it's done.

11 MS. WALLMAN: Your Honor, that is
12 really broad. Looking, for example, at
13 Exhibit 57, this is part of the testimony of
14 Charles Herring for his "holy cow" moment. He
15 was in the course of conducting his work at
16 the company, part of which involved keeping an
17 eye on the competition. He saw a press
18 release, this press release and saw what Mojo
19 intended to launch as a block.

20 This progression goes through to
21 the actual announcement of a launch of Mojo
22 some months later. This is all a part of his

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1 present sensory impression about how he's
2 reacting to this information as it came to him
3 and as he needed to process it as part of his
4 competitive analysis.

5 JUDGE SIPPEL: But we don't care.
6 Don't you understand? I mean, he should be
7 able to get on the stand and testify, you
8 know, "I came to this conclusion because I do
9 business and here's how I conduct it. I had
10 these telephone conversations. I had these
11 meetings. I know a little bit something about
12 the market and this is how it works."

13 He doesn't have to say that, "I
14 know it because I read this and this caused me
15 to think this." I mean, we don't need that.
16 He's a businessman. He can testify as to what
17 he does for his business, but he can't be
18 testifying that he runs his business off of
19 news items.

20 I mean, that seems to be what's
21 happening here, and you know, that's not the
22 way that these cases are put on. He's got to

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1 come in and testify what he does as a
2 businessman, how he makes his business
3 decisions and what business people he talks to
4 and why, you know, what agreements he wanted
5 and why he didn't get them, you know, a whole
6 range of things.

7 And then you've got experts that
8 can fill in the blanks a little bit there, but
9 not him.

10 I'm not necessarily buying
11 everything that I'm hearing on the other side,
12 but I'm saying that this is becoming a little
13 bit more evident as to what's going on here,
14 and it is getting to be a little bit trying,
15 if I can use that term.

16 MS. WALLMAN: It I may perhaps
17 just one more line, Your Honor. It's
18 difficult to understand. If the true answer
19 is how did you know what Mojo was up to and
20 his answer is, "I read their press release.
21 I read the article in Multi-channel News, I
22 read these publicly available sources and I

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1 drew an understanding of" --

2 JUDGE SIPPEL: Well, that he
3 could. Yeah, if he's asked that question and
4 he says that that's how it came to my
5 attention, that's fine, but that's different
6 than just --

7 MR. COHEN: There's a difference
8 in that and admitting the news article as
9 fact. That's our point, Your Honor. That's
10 been our entire --

11 JUDGE SIPPEL: I'll save my voice
12 here.

13 MR. COHEN: That's been our entire
14 point. We're not suggesting that he didn't in
15 2006 and 2007 draw some impressions about
16 Mojo. That's different than dumping in all of
17 this stuff as fact. They have to prove it
18 however they can prove it, but with admissible
19 testimony.

20 There will be a Mojo witness here
21 -- I mean an In Demand witness here. They'll
22 be able to cross-examine him. He's be able to

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1 testify what he believed at the time. We're
2 not trying to stop him from telling his story,
3 and I don't think we could even if we wanted
4 to try.

5 JUDGE SIPPEL: You're absolutely
6 right. I wouldn't let that happen.

7 Well, I'll tell you how dangerous.
8 this stuff can get. This is not directly on
9 point, but it's sort of in the ballpark.
10 There was a very good District Court judge
11 here in the District of Columbia that was
12 assigned the Microsoft monopoly case, and in
13 the course of his preparation he was so
14 careful to want to know what all of it was
15 about that he read a book on Microsoft.

16 And you know, when one of the
17 parties found out about it, who did they go
18 to? They went up to the Court of Appeals, and
19 the Court of Appeals took the case away from
20 him because he had read a book about the
21 subject.

22 So you know, how much of a book --

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1 you're not going to push books at me. Learned
2 treatises are useful with an expert, but
3 learned treatises alone are not going to be
4 used. You can cite to them, you know, to make
5 a point and say here's a precedent if you want
6 to cite to it in your proposed findings. I
7 can take notice of those.

8 But we just want the witness to
9 tell who he is and what he does for a living
10 and why he thinks he's getting a bad deal
11 here. That's all.

12 MR. FELD: Your Honor, given Mr.
13 Cohen's most recent statement, if I may
14 propose one way to go forward, if we're
15 willing to agree that the trade publications
16 in these books, you know, formed a foundation
17 for Mr. Herring's knowledge and we are not
18 offering them for the truth of the article,
19 but that it is appropriate for Mr. Herring to
20 say, "Yes, in the course of my business I read
21 these things and this is how I formulated my
22 opinion," I think that we can all move forward

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1 and not need to enter these items in the
2 record as evidence for the truth of the matter
3 stated.

4 We're only offering them for these
5 very limited purposes.

6 MR. COHEN: I don't think that
7 cures the objection. What we're saying is he
8 can testify about how he is certainly known to
9 testify, that he thought that Mojo was a
10 similar network based on what he learned, and
11 he'll testify about it. We have some quarrels
12 about whether he's trying to be an expert
13 rather than a fact witness, but that he heard
14 that Mojo was launching, and that got him
15 concerned.

16 I mean, that's the story he'll
17 tell. He's not going to tell with reference
18 to these articles which are essentially
19 footnotes to his points, or he shouldn't. I
20 shouldn't say he's not going to. He shouldn't
21 be allowed to would be our argument, Your
22 Honor.

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1 JUDGE SIPPEL: Well, I mean, this
2 is illustrative of what the problem is. The
3 problem is you can never come to a
4 satisfactory solution if you start dealing
5 with this stuff this way. You know, like I
6 said, we just don't need it. We don't need it
7 in the record, and it certainly is not --
8 well, I've said everything that I need to say
9 on it.

10 I appreciate, Mr. Rose, that you
11 parceled out these troublesome areas, and my
12 ruling will be that Exhibits 57 to 80 --
13 that's WTV Exhibit 57 to 80 -- have been
14 sufficiently identified, and they are rejected
15 for the reasons of hearsay, reliability, et
16 cetera.

17 MR. ROSE: Your Honor, with the
18 exception of 58, 66, and 74, which we have
19 discussed.

20 JUDGE SIPPEL: Yeah, with certain
21 exceptions. Now we've got 57 to 80 with the
22 exception of 58 and 66 --

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1 MR. ROSE: And 74.

2 MR. COHEN: We just need to hear
3 from --

4 JUDGE SIPPEL: And 74 we have to
5 hear some argument on.

6 Does that cover it?

7 MR. COHEN: Yes, Your Honor.

8 JUDGE SIPPEL: So it's everything
9 within 57 and 80 is out with the exception of
10 three, 74 that we're going to talk about and
11 66 and 58 which are identified and are
12 received in evidence.

13 (Whereupon, the documents referred
14 to were marked WealthTV Exhibit
15 Nos. 57 through 73 and 75 through
16 80 for identification and were
17 rejected, except Nos. 58 and 66,
18 which were received in evidence.)

19 JUDGE SIPPEL: Now let's talk
20 about 74.

21 MR. ROSE: Seventy-four is an
22 invoice. It's a business record that WealthTV

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1 has. It's a contract with Reuters. It's
2 basically a show that they were carrying, part
3 of their channel essentially. It's a contract
4 with personal content.

5 JUDGE SIPPEL: And who was
6 carrying it?

7 MR. ROSE: The WealthTV was
8 carrying on their network, I believe is the
9 right term.

10 JUDGE SIPPEL: Reuters News
11 Service?

12 MR. ROSE: Yeah, something that
13 they give service. I'm not quite sure how it
14 was presented, but this is the contract to use
15 the Reuters content.

16 JUDGE SIPPEL: Well, let me hear
17 from the other side.

18 MR. COHEN: Your Honor, I don't
19 know we have to burden the record with this.
20 I mean, you know, he's going to testify that
21 they have business programming on their
22 network, and I don't think that that's in

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1 dispute.

2 So, I mean, you know, it's just a
3 question of whether we want to burden the
4 record with this one contract. I don't know
5 what show this is, but there clearly is going
6 to be testimony that they have business
7 programming on their network, and I don't
8 think there will be any dispute about that.

9 But what this document is and what
10 the actual relevance is I don't know, but you
11 know, it's six in one or half a dozen in the
12 other for us, Your Honor.

13 JUDGE SIPPEL: Well, let me go up
14 the line then. Mr. Solomon, Mr. Beckner, any
15 different feeling, any difficulty?

16 MR. MILLS: It's probative. It's
17 just one isolated record. There must be many.
18 It doesn't seem to signify anything.

19 JUDGE SIPPEL: Well, we're hitting
20 it pretty hard today. I'll receive this in.
21 There doesn't seem to be any objection to it.
22 So 74, WTV Exhibit 74 is identified as a

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1 Reuters contract of sorts, and it's identified
2 and received in evidence as WTV Exhibit 74.

3 (Whereupon, the document referred
4 to was marked WealthTV Exhibit No.
5 74 for identification and received
6 in evidence.)

7 JUDGE SIPPEL: Okay. The next
8 one.

9 MR. ROSE: I think the next one
10 would be 81. We're making some progress here.
11 This is an E-mail exchange between Mr. Urazy
12 (phonetic), the EDP of sales that we discussed
13 earlier for the Wealth, and an individuals at
14 Time Warner. Mr. Herring is also in this
15 chain. I believe it's just another effort to
16 pitch the coverage to get some carriage.

17 MR. COHEN: Your Honor, let me,
18 again, if it's not too late to say what I'm
19 about to say. If I can expedite, 81 to 88 are
20 a series of E-mails between Time Warner and
21 WealthTV with respect to WealthTV's efforts to
22 gain carriage on Time Warner. We have no

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